

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Petitioner Asaad, a citizen of Yemen, seeks a writ of habeas corpus under 28 U.S.C. § 2241 restraining Immigration and Customs Enforcement (ICE) from deporting him pending a ruling on his motion to reopen deportation proceedings that is currently before the Board of Immigration Appeals (BIA). Petitioner moves on the ground that deporting him while his appeal is pending would violate (1) INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (requiring that an alien in removal proceedings be given a reasonable opportunity to prove his case); (2) 8 C.F.R. § 1240.1(c) (same); (3) Procedural Due Process under the Fifth Amendment to the United States Constitution; and (4) the Convention Against Torture.

Petitioner alleges as follows. A final order of removal has been issued against Petitioner.

Pet'n ¶ 4. As a result, Petitioner alleges that he is in constructive custody because he must report to the ICE Field Office in Bakersfield, California every month. *Id.* Petitioner filed an administrative

1 appeal of the initial removal order with the BIA. Pet'n ¶ 21. On March 25, 2005, the BIA
2 dismissed the administrative appeal and affirmed the Immigration Judge's removal order. *Id.*
3 Petitioner then appealed the BIA's decision to the Ninth Circuit Court of Appeals. Pet'n ¶ 22. On
4 April 24, 2007, the Ninth Circuit denied the petition on the ground that substantial evidence
5 supported the BIA's decision. *Id.* Throughout these proceedings, Petitioner was represented by
6 Mr. Singh, an attorney. In June, 2006, Petitioner met with new counsel, Mr. Leichty, who advised
7 him that he had a claim for ineffective assistance of counsel based on Mr. Singh's representation in
8 Petitioner's initial removal proceedings and on appeal at the BIA. On August 30, 2007, Mr.
9 Leichty filed a motion to reopen removal proceedings with the BIA on Petitioner's behalf. Pet'n ¶
10 24. On April 8, 2008, the BIA denied Petitioner's motion to reopen on the basis that it was
11 untimely. Pet'n ¶ 28. Petitioner sought review of this decision by the Ninth Circuit, but the Ninth
12 Circuit denied the petition for review on the ground that Petitioner failed to establish that he acted
13 with due diligence. Pet'n ¶ 30.

14 In October, 2010, Petitioner consulted with his current counsel, who filed a second motion
15 to reopen with the BIA based on ineffective assistance of counsel. Pet'n ¶ 31. Petitioner's second
16 motion was based on both Mr. Singh and Mr. Leichty's representation. *Id.* Petitioner asked the
17 BIA to stay his deportation until the BIA acts on the motion to reopen. Pet'n ¶ 33. The BIA has
18 not ruled on Petitioner's request for a stay of deportation. *Id.* Petitioner argues that even though
19 the BIA has not yet acted on his motion for a stay, this Court should issue a stay because "waiting
20 for the BIA's decision as to the stay would prejudice Petitioner because the indefinite timeframe
21 for administrative action would cause unreasonable delay." Pet'n ¶ 12. Petitioner argues that if he
22 is deported before the BIA rules on his motion to reopen, his motion to reopen would be
23 automatically withdrawn pursuant to 8 C.F.R. § 1003.2(f).

24 II. DISCUSSION

25 A. Standard of Review

26 This Court may entertain a petition for a writ of habeas corpus if the petitioner "is in
27 custody under or by color of the authority of the United States." 28 U.S.C. § 2241. The district
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1 courts have jurisdiction to review denials of stay requests pending motions to reopen immigration
2 proceedings. *Blancada v. Turnage*, 891 F.2d 688, 689 (9th Cir. 1989).

3 A district court shall “award the writ or issue an order directing the respondent to show
4 cause why the writ should not be granted, unless it appears from the application that the applicant
5 or person detained is not entitled thereto.” 28 U.S.C. § 2243.

6 B. Petitioner’s Claims

7 Petitioner claims that his deportation should be stayed until the BIA has considered his
8 motion to reopen the immigration proceedings. As set forth above, Petitioner’s motion to reopen is
9 based on additional allegations of ineffective assistance of counsel which have not yet been
10 considered by the BIA. Liberally construed, Petitioner’s claim appears colorable under § 2241 and
11 merits an answer from Respondent.

12 **III. CONCLUSION**

13 1. The Clerk shall serve by mail a copy of this Order, the petition and all attachments
14 thereto, upon the Respondents and the Respondent’s attorney, the United States Attorney for the
15 Northern District of California.

16 2. The Court finds that in light of the fact that Petitioner has already unsuccessfully
17 appealed the deportation order against him twice, there is good cause to extend the time for
18 Respondent to respond to the Petition under 28 U.S.C. § 2243. Therefore, Respondent shall file
19 with the Court and serve on Petitioner, within **twenty (20) days** of the date this Order is filed, an
20 answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing
21 cause why a writ of habeas corpus should not be granted. Respondent shall file with the answer
22 and serve on Petitioner a copy of all portions of the record of deportation proceedings that have
23 been transcribed previously and that are relevant to a determination of the issues presented by the
24 petition. The Court likewise finds that there is good cause to extend the time for a decision on this
25 matter in order to allow the Petitioner to respond to the answer. If Petitioner wishes to respond to
26 the answer, he shall do so by filing a traverse with the Court and serving it on Respondent within
27 **fifteen (15) days** of the date the answer is filed.
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1 3. In lieu of an answer, Respondent may file a motion to dismiss on procedural
2 grounds as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section
3 2254 Cases within **twenty (20) days** of the date this Order is filed. If Respondent files such a
4 motion, Petitioner shall file with the Court and serve on Respondent an opposition or statement of
5 non-opposition within **fifteen (15) days** of the date the motion is filed, and Respondent shall file
6 with the Court and serve on Petitioner a reply within **ten (10) days** of the date the opposition is
7 filed. The Court will decide the motion on the papers, and no hearing date will be set.

8 **IT IS SO ORDERED.**

9 Dated: May 31, 2011


LUCY H. KOH
United States District Judge

United States District Court
For the Northern District of California